SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 166

J. HOWARD JOHNSON, AS RECEIVER OF ALL THE RENTS AND PROFITS ISSUING OUT OF PREMISES SITUATED ON THE NORTHEASTERLY CORNER OF GREEN AND BEAVER STREETS, IN THE CITY OF ALBANY, NEW YORK, AND WALLACE J. ALLENDORF,

Petitioners,

vs.

JOHN M. SMITH, COUNTY TREASURER OF THE COUNTY OF ALBANY, ET AL.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, ALBANY COUNTY, AND BRIEF IN SUPPORT THEREOF.

ROLAND FORD,
HAROLD J. HINMAN,
C. RAYMOND BURTON,
ELLIS J. STALEY, JR.,
JOHN F. LUCEY,
Counsel for Petitioners.

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No. 166

J. HOWARD JOHNSON, AS RECEIVER OF ALL THE RENTS AND PROFITS ISSUING OUT OF PREMISES SITUATED ON THE NORTHEASTERLY CORNER OF GREEN AND BEAVER STREETS, IN THE CITY OF ALBANY, NEW YORK, AND WALLACE J. ALLENDORF,

Petitioners,

vs.

JOHN M. SMITH, COUNTY TREASURER OF THE COUNTY OF ALBANY; YETTA V. SANDLER, JOHN CARROLL, L. BERMAN, NEW YORK STATE LIQUIDATING CORP., FEDERAL INVESTORS, INC., "JOHN DOE" AND "MARY ROE", SAID LAST TWO NAMES BEING FICTITIOUS, BEING ALL TENANTS, OCCUPANTS AND CLAIMANTS UNDER ANY OF THE TAX SALES DESCRIBED IN THE COMPLAINT WHOSE NAMES ARE UNKNOWN TO THE PLAINTIFFS

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK

To the Honorable the Supreme Court of the United States:

The petition of J. Howard Johnson, the Receiver of all the rents and profits issuing out of the premises situated on

the northwest corner of Green and Beaver Streets, City of Albany, N. Y., and Wallace J. Allendorf and John F. Lucey, Special Guardian for Eva Kimball Turnbull, et al., respectfully shows:

1. This is an action to set aside various tax sales made by the County Treasurer of the County of Albany and declaring the same to be null and void, and requiring the purchasers on said sales to account for the rents collected since said purchasers went into possession. The tax sales in question were made during a period when petitioner J. Howard Johnson, as Receiver in a partition action, was in possession of the premises in question.

This petition seeks to review the decision of the Court of Appeals of the State of New York holding that although the property was in *custodia legis* at the time of the assessment of the taxes in question and the sales thereof, said sales were legal and valid.

2. Petitioners presented a question that due to the separation of the powers of Government, the property in question having been seized by the judicial power, could not be interfered with by another branch of the Government under this fundamental doctrine, which was discussed at length in Matter of Tyler 149 U. S. 191.

Jurisdiction and Timeliness

3. This petition for certiorari is made under 28 U. S. C. A. § 344, subd. (b), and § 350, and the Court has jurisdiction to grant the writ. *Department of Banking* v. *Pink*, 317 U. S. 264 (1942).

4. The decision of the Court of Appeals was handed down January 16, 1948. On the 16th of January, 1948, the remittitur was issued by that Court reversing the order of the App. Div. and affirming the order of the Special Term of

the Supreme Court, State of New York, dismissing the complaint; on February 8, 1948, a motion was made in the Court of Appeals on behalf of the defendants, YETTA V. SANDLER, JOHN CARROLL, and L. BERMAN to include these three defendants as appellants in the Court of Appeals; that it was claimed that Yetta V. Sandler, John Carroll, and L. Berman had joined in a motion before the Appellate Division of the Supreme Court, State of New York, for leave to appeal to the Court of Appeals, but that the order granting leave to appeal did not include said three defendants; that said three defendants did actually serve a notice of appeal. The Court of Appeals on March 18, 1948, denied said motion, without prejudice to a further application, providing the Appelate Division resettle that Court's order granting permissing to appeal to the Court of Appeals. On March 22, 1948, such a motion was made in the Appellate Division of the Supreme Court of the State of New York, and on the 31st day of March, 1948, the order permitting said three defendants to appeal to the Court of Appeals was amended and resettled *nunc pro tunc* permitting such appeal. On April 1, 1948, a motion was then made in the Court of Appeals to amend the remittitur issued by that Court so as to include said three defendants, and on April 22, 1948, the Court of Appeals granted said motion and amended the remittitur issued by that Court so as to include said three defendants, YETTA V. SANDLER, JOHN CARROLL and L. BERMAN, as appellants on appeal to said Court, and MAURICE FREEDMAN, as counsel for said appellants, and the Supreme Court, Albany County, was requested to direct its Clerk to return said remittitur to the Court of Appeals for amendment accordingly, and that said remittitur was amended accordingly April 22d, 1948, and the same is now on file with the Clerk of the Appellate Division of the Supreme Court, Third Department, at Albany, N. Y. Thereupon,

on April 22, 1948, the said remittitur became the final order of the Court of Appeals adjudicating the rights of all the parties to this action.

Opinions Below

5. The opinion of the Appellate Division of the Supreme Court, Third Department was reported in 272 App. Div. 6. The opinion of the Court of Appeals was reported in 297 N. Y. 165.

Summary Statement of the Matter Involved

6. An action of partition was commenced in November, 1925 for the partition of premises known as 20-24 Green Street, Albany, N. Y. Judgment of partition and sale was entered December 3, 1927. There were upwards of 50 parties to the action. Various phases of the case have been reported as follows: *Stock* v. *Mann,* 129 Misc. 201; 132 Misc. 474; 229 App. Div. 19; 255 N. Y. 100, reargument denied, 256 N. Y. 545; 254 N. Y. 507.

George W. McEwan was appointed receiver of the property March 2, 1935. He was succeeded by J. Howard Johnson, plaintiff, who was appointed and qualified as receiver February 3, 1940. The property in question was assessed for taxes and water rents in 1938 and 1939. These taxes and water rents were returned to the County Treasurer and the property was sold by him at tax sales. The County of Albany purchased the property and assigned its right to Federal Investors, Inc. The property was sold for about Five Thousand Five Hundred ($5,500.00) Dollars, and was assessed for Fifty-Two Thousand ($52,000.00) Dollars, later reduced to Forty Thousand ($40,000.00) Dollars. This action was brought by the receiver in partition and by one of the parties to the partition action to set aside these tax sales and conveyances pursuant to such

sales and to compel an accounting of the rents collected by the purchasers.

The action is based on the proposition that the property subject to the partition action was in *custodia legis* through the receiver, and that a sale thereof during such custody was void; that the property was seized by the court through its receiver, who took charge of it, collected the rents and profits, and that the court in so seizing the property and not itself providing for the payment of taxes, as has been customary in those matters from time immemorial, has taken the property of the parties to the partition action, some of whom were infants, without due process of law, and has not accorded to the said parties equal protection of the laws, and that the action of the court in the premises did not preserve, for the benefit of the parties, a separation of the powers of Government.

Question Presented

7. The following question is presented in this case: Were the tax sales in question void, the property being at the time in *custodia legis,* and does the complaint in this action state a cause of action?

Assignment of Errors

8. It is submitted that the Court of Appeals erred:

(a) In holding that the property in question, although in *custodia legis* through a receiver, was properly sold for taxes without the permission of the Court.

(b) In holding that the complaint in this action did not state a cause of action.

(c) In holding that, under the Tax Law of the State of New York, a County Treasurer is directed in mandatory terms to sell real property for unpaid taxes, and that there

is no statutory provision exempting property in the hands of a receiver from the operation of the provisions of the Tax Law, such statutory provision being necessary to permit such exemption.

(d) In holding that since it is not jurisdictional to sue a receiver without leave of the court, the sale of property in custody of a receiver, without leave of the court, is likewise not jurisdictional.

(e) In holding that there was no encroachment by the taxing officer on the judicial department, and that separation of the powers of government was not involved.

Reasons for Allowance of the Writ

9. The reasons relied on by petitioners for allowance of the writ are as follows:

(a) To permit the taxing officer to seize and sell property in *custodia legis* denies to those interested in the property equal protection of the laws, and deprives them of property without due process of law.

(b) The result of the decision in this case is to ignore the maintenance of the system of checks and balances characteristic of republican institutions, which requires that the judicial branch shall not be invaded or encroached upon.

(c) The result of said decision is to permit a piece of property worth at least $40,000 to be acquired for about $5,500 by a court which has seized the property, and deprived the parties interested in the property from collecting its rents and profits, and rendered them helpless and refusing to protect infants interested the wards of the court.

WHEREFORE, petitioners pray that a writ of certiorari may be issued out of and under the seal of this Court directed to the Supreme Court of the State of New York in

and for the County of Albany commanding that Court to certify and send to this Court on a certain day to be therein designated a full and complete transcript of the record and all proceedings of the said Court in this cause to the end that the case may be reviewed and determined in this Court as provided in 28 U. S. C. A. § 344 (b); and that the final order and judgment of the said Court and every thereof may be reviewed and corrected by this Court in conformity with the Constitution and Laws of the United States; and that said final judgment may be reversed and the determination of the Appellate Division of the Supreme Court be confirmed; and petitioners pray for such other and further relief as to this Court may seem just and proper, and the petitioners will ever pray.

ROLAND FORD,
HAROLD J. HINMAN,
C. RAYMOND BURTON,
ELLIS J. STALEY, JR.,
JOHN F. LUCEY,
Counsel for Petitioners.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 166

J. HOWARD JOHNSON, as Receiver of all the Rents and Profits Issuing Out of Premises Situated on the Northeasterly Corner of Green and Beaver Streets, in the City of Albany, New York, and WALLACE J. ALLENDORF,

Petitioners,

vs.

JOHN M. SMITH, County Treasurer of the County of Albany, YETTA V. SANDLER, JOHN CARROLL, L. BERMAN, NEW YORK STATE REALTY LIQUIDATING CORP., FEDERAL INVESTORS, INC., "JOHN DOE" and "MARY ROE", Said Last Two Names Being Fictitious, Being All Tenants, Occupants and Claimants Under Any of the Tax Sales Described in the Complaint, Whose Names Are Unknown to the Plaintiffs.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

Statement of the Case

This action was brought by a receiver in partition, together with one of the numerous parties interested in the

property which is the subject of the partition action, on behalf of himself and all others similarly situated, to set aside tax sales of the said property and conveyances pursuant to such sales, and to compel an accounting of rents collected by the purchasers at said sales and by their assignees.

This action was authorized by the Court (fol. 82).

The action is based on the proposition that the property subject to the partition action was in the custody of the court through its receiver, and that a sale thereof during such custody was void.

The Original Partition Action

The action in partition was commenced November 17, 1925 (fol. 78). The property in question is known as 20-24 Green Street, Albany, New York (fol. 83).

Judgment of partition and sale was entered December 3, 1927. There are upwards of fifty parties to the action (fols. 79-109).

Various phases of the case have been reported as follows: *Stock* v. *Mann*, 129 Misc. 201; 132 Misc. 474; 229 App. Div. 19; 255 N. Y. 100, reargument denied, 256 N. Y. 545; 254 N. Y. 507.

A notice of pendency was recorded May 13, 1929 (fol. 115).

On March 2, 1935, George W. McEwan was duly appointed receiver. He was succeeded by J. Howard Johnson, who was appointed and qualified as receiver, February 23, 1940 (fols. 80, 116).

The property in question was assessed in the Albany Tax District December 29, 1938, for taxes and water rents (fols. 86, 90), and was also assessed on December 29, 1939, for taxes and water rents (fols. 95, 98).

These taxes and water rents were returned to the County Treasurer and the property was sold by him at tax sales as follows:

1938 Assessment. Sold Sept. 1940 to the County of Albany for $2,223.52. 1000 years (fol. 92).

1939 Assessment. Sold Sept. 1941 to the County of Albany for $2,227.27. 1000 years (fol. 101).

The County of Albany assigned its rights under said sales to Federal Investors, Inc. (fols. 93, 101), who later received conveyances (fols. 93, 101).

Federal Investors, Inc., sold to New York State Realty Liquidating Corp., which, in turn, sold to Yetta V. Sandler, who is now collecting the rents (fol. 105).

Notices were served on the occupants. These notices, with proof of service, appear in full on pp. 55-62.

The tax deeds have not been recorded (fol. 119).

The property in question was also sold to the County of Albany in 1942 and 1944 (fol. 119).

The receivers in the partition action had power and authority to take possession of the property in question, receive the rents and profits and lease the same (fols. 116, 143-153).

J. Howard Johnson took possession under his appointment as receiver in February, 1940 (fol. 82). The sales by the County were held in September, 1940 and 1941.

The properties were assessed for $40,000 (reduced value) and $52,000 (fols. 87, 95).

As stated above, they were sold for about $5,500 for the assessments of 1938 and 1939.

Yetta V. Sandler, the present owner of the rights under the tax deeds of 1940 and 1941 sales, is a tenant for years in the premises (fol. 103).

Jurisdictional Statement and Assignment of Errors

The Court will find these respectively in paragraphs 3, 4 and 8 of the petition herein.

Point I

Property in a receiver's hands is not subject to seizure for taxes. It is in the custody of the Court. The maintenance of the system of checks and balances characteristic of republican institutions requires that the judicial branch shall not be invaded or encroached upon. The Court itself will enforce the lien of the tax.

In *re Tyler*, 149 U. S. 164, it appeared that petitioner was a sheriff. He applied for writ of habeas corpus claiming he was unjustly detained by a United States marshal.

A railroad company went into the hands of a receiver, and all its property was placed under the receiver's care and management and protected by injunction.

The receiver filed a bill in equity in the United States District Court against the treasurers and sheriffs of the counties through which the railroad was maintained. He alleged that the treasurers were about to issue tax executions, and the sheriffs about to levy and seize thereunder, property of the railroad. The bill alleged that the taxes were void, and that portion of the same which were valid, had been tendered and refused. The court issued an injunction *pendente lite* forbidding the collection of any taxes not admitted to be due.

Thereafter new taxes accrued, and again the receiver tendered the taxes admitted to be due. These amounts were received but thereupon, warrants were issued by the county treasurers for the additional taxes claimed to be due, and property of the railroad was seized. Again the sheriff was enjoined, and he was cited for and held in contempt. He then applied for a writ of habeas corpus. On this application the Court said:

> "The general doctrine that property in the possession of a receiver appointed by a court is in *custodia*

legis, and that unauthorized interference with such possession is punishable as a contempt, is conceded; but it is contended that this salutary rule has no application to the collection of taxes. Undoubtedly property so situated is not thereby rendered exempt from the imposition of taxes by the government within whose jurisdiction the property is, and the lien for taxes is superior to all other liens whatsoever, except judicial costs, when the property is rightfully in the custody of the law, but this does not justify a physical invasion of such custody and a wanton disregard of the orders of the court in respect of it. The maintenance of the system of checks and balances characteristic of republican institutions requires the coordinate departments of government, whether federal or state, to refrain from any infringement of the independence of each other, and the possession of property by the judicial department cannot be arbitrarily encroached upon, save in violation of this fundamental principle.

"This levy of a tax warrant, like the levy of an ordinary *fieri facias*, sequestrates the property to answer the exigency of the writ; but property in the possession of the receiver is already in sequestration, already held in equitable execution, and while the lien for taxes must be recognized and enforced, the orderly administration of justice requires this to be done by and under the sanction of the court. It is the duty of the court to see to it that this is done; and a seizure of the property against its will can only be predicated upon the assumption that the court will fail in the discharge of its duty, an assumption carrying a contempt upon its face."

As the Court pointed out in its opinion, the rule in question does not have the effect of withdrawing the property assessed from taxation, or change the paramount nature of the tax. It simply withdraws the property from the custody of the owner and places it in custody of the Court so it is no longer subject to sale by the ordinary tax processes as it is already sequestered and subject to sale by

the Court for the purpose. In a suit such as this one, the parties are helpless. The Court taking custody of the property should protect everyone interested, including the taxing authorities.

In our form of government with its separation of powers and departments, that separation should be jealously guarded. We fail, ordinarily, to appreciate its salutary effects, until they are in some measure ignored, as they must be in the case of war.

The separation of the powers and departments of government is a reciprocal proposition. On the one hand the Executive Department respects the Judiciary when the latter takes custody of property to be administered for the benefit of all of the parties.

On the other hand the Judiciary respects the Executive Department, so that it can perform its functions.

A number of the cases which have to do with the "Secrets of State" are reviewed in *Worthington* v. *Scribner*, 109 Mass. 48.

The situation here is that over 20 years ago this action of partition was commenced and in the course of the proceedings receivers have been appointed. These receivers took charge of the property, collected the rents and profits and divested the parties of all control over the premises which were the subject of the action. Some of the parties are infants with special guardians. The result has been that one branch of the Government has seized the property from the citizens, rendered them helpless and failed to give them the protection which should be afforded them by the judiciary.

From time immemorial courts in connection with their equitable jurisdiction have sequestered property belonging to litigants.

Angel v. *Smith*, 9 Ves. Jun. Repts. 335.

Daniell's Ch. Pr. (8th ed.), p. 801.

What is due process and equal protection of the law may be ascertained by an examination of those settled usages and modes of proceedings existing in the law of England before the emigration of our ancestors, and shown not to have been unsuited to our civil and political condition by having been acted on after the settlement of this country. A process of law must be taken to be due process if it can show the sanction of settled usage both in England and this country. *Twining* v. *New Jersey*, 211 U. S. 78, 100. *Butler* v. *Perry*, 240 U. S. 328, 333.

While it is true that no one has a vested right in a rule of the common law, it is also true that the legislative power of a state can only be exercised in subordination to the fundamental principle of right and justice which is guaranteed by the Fourteenth Amendment. The seizure of a citizen's property, divesting him of its use and income, by one arm of the Government whereby another arm of the Government is permitted to seize that property and dispose of it, is a wrongful and injurious invasion of property rights. *Truax* v. *Corrigan*, 257 U. S. 311, 329.

It was suggested by the Court of Appeals that the commencement of an action against a receiver without leave of the Court is not jurisdictional.

No doubt that rule was correct.

Where a receiver has been appointed by the Court and an action against that receiver has been brought in Court, the Court itself is in a position to forgive or punish the interference with its rights. In such case, the Court has control of the action and may stop it or set it aside.

The distinction was noted and discussed in *Preston* v. *Loughran*, 58 Hun (N. Y.) 210, 215.

The case is different where an executive department in an extra-judicial proceeding invades the province of the Court. On a tax sale there is no action pending in Court

in the tax proceedings, and therefore the case is different from the one where a receiver appointed by the Court is sued in another proceeding in Court. In the case of the Tax sale there is no proceeding pending in court. It is simply an extra-judicial proceeding carried on by the executive department.

POINT II

Petitioners' application for a writ of certiorari should be granted, and this Court should review the decision of the Court of Appeals and finally reverse it.

Respectfully submitted,

ROLAND FORD,
HAROLD J. HINMAN,
C. RAYMOND BURTON,
ELLIS J. STALEY, JR.,
JOHN F. LUCEY,
Counsel for Petitioners.

FILE COPY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 166

J. HOWARD JOHNSON, as Receiver of All the Rents and Profits Issuing Out of Premises Situated on the Northeasterly Corner of Green and Beaver Streets, in the City of Albany, New York, and WALLACE J. ALLENDORF,

Petitioners,

vs.

JOHN M. SMITH, County Treasurer of the County of Albany, et al.

BRIEF OF RESPONDENT, JOHN M. SMITH, COUNTY TREASURER OF THE COUNTY OF ALBANY, STATE OF NEW YORK, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

WALTER L. COLLINS,
FRANK PEDLOW,
NEILE F. TOWNER,
ROBERT E. WHALEN,
Counsel for Respondent John M. Smith.

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J. HOWARD JOHNSON, as Receiver of All the Rents and Profits Issuing Out of Premises Situated on the Northeasterly Corner of Green and Beaver Streets, in the City of Albany, New York, and WALLACE J. ALLENDORF,

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vs.

JOHN M. SMITH, County Treasurer of the County of Albany, et al.

BRIEF OF RESPONDENT, JOHN M. SMITH COUNTY TREASURER OF THE COUNTY OF ALBANY, STATE OF NEW YORK, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

I

Statement of the Case

Because of certain inaccuracies in the Petition and the reasons for allowance of the Writ the respondent, John M. Smith, deems it necessary to make this statement.

At page 4 of Petitioner's Petition, in Subdivision 6, it is stated the property was sold for about fifty-five hundred dollars ($5,500.00) and assessed for fifty-two thou-

sand dollars ($52,000.00) later reduced to forty thousand dollars ($40,000.00) and at page 6, subdivision 9, of the Petition, paragraph C, under reasons for allowance of Writ, the Petitioner states,

"The result of said decision is to permit a piece of property worth at least $40,000.00 to be acquired for about $5,500.00 by a Court which has seized the property and deprived the parties interested in the property from collecting its rents and profits, and rendered them helpless and refusing to protect infants interested, the wards of the Court."

The facts are as follows:

The amount for which this property was sold in the respective years of 1939 and 1940 to the County of Albany, was only the amount of the tax liens against the property, with interest and expenses of sale, which petitioners had neglected and failed to pay within the time provided by law. The conveyance of the County's interest to the Federal Investors, Inc., likewise was only for the amount of the tax liens against said property.

The power and authority of the respondent, John M. Smith, as County Treasurer, to sell for tax liens is Chapter 86 of the Laws of 1850, of the Laws of the State of New York and of the Acts amendatory and supplemental thereto; the Tax Law of the State of New York, Chapter 62 of the Laws of 1909 of the State of New York, and Acts amendatory and supplemental thereto, known as Chapter 60 of the Consolidated Laws of the State of New York, and the Charter of the City of Albany.

The procedure for sale for unpaid taxes and what was done herein are clearly set forth in the Court of Appeals decision in *Johnson* v. *Smith* (297 N. Y. 165).

When the taxes assessed against this property became due and payable, they were not paid within the time pre-

scribed by law, and upon default were returned to the County Treasurer of the County of Albany, who, thereupon, proceeded to advertise and sell the said premises for taxes and interest, including the water rents and expense of the sale, and thereafter sold the premises pursuant to law.

These facts are admitted by the petitioner herein (see Complaint in action, paragraphs 7 to 23 inclusive, folios 87 to 101).

Argument

Summary of Argument

Point A.—This being an appeal from a State Court, the statement of Petitioner does not comply with Rule 12 of the Rules of the Supreme Court in that it does not specify the raising of the alleged Federal question in the Courts below.

Point B.—No Federal question having been brought up in the State Courts, Petitioner cannot now set up any denial of an alleged Federal right.

Point C.—There was no denial of Petitioner's rights under the 14th Amendment of the Constitution of the United States nor of the Constitution of the State of New York.

Point A

Petitioner's statement does not comply with Rule 12 of the Rules of the Supreme Court in that it fails to specify the raising of the alleged Federal question in the Courts below.

Nowhere in petitioner's statement is it specified at what stage of the proceedings in the Court of the first instance and in the Appellate Court, at which and the manner in

which the Federal question (14th Amendment) sought to be reviewed was raised; the method of raising it and the way in which it was passed upon by the State Court.

As a matter of fact the 14th Amendment was never mentioned until Petitioner made the application for a writ of certiorari.

This is sufficient to deny the petition.

United States v. *Rimer*, 220 U. S. 547.

POINT B

No Federal question having been brought up in the State Court, petitioner cannot now set up any denial of an alleged Federal right.

Throughout the State Courts petitioner contended that the County Treasurer was without authority to conduct tax sales on this property for the delinquent taxes because there was a receiver of rents appointed by the State Court in a partition action then pending. Petitioner argued that the property was in custody of the State Court and the County Treasurer as an agent of the executive branch of government could not perform the duty commanded of him by the Legislature to sell this property because of default in payment of taxes.

The petitioner argued about the separation of powers between the judicial, executive and legislative branches in the State.

Nowhere in any of the State Courts did the petitioner raise the question that his rights or those of any of the parties to the partition action under the 14th Amendment of the United States Constitution were denied, violated, infringed or jeopardized.

Having failed to interpose any denial of any alleged Federal right in the State Courts, petitioner is precluded

from asserting the alleged denial of a Federal right for the first time on this application.

Appleby v. *Buffalo*, 221 U. S. 524, 55 L. Ed. 838, 31 Sup. Ct. 699.

Wilson v. *Cook* (Ark.), 327 U. S. 474.

POINT C

There was no denial of petitioner's rights under the 14th Amendment of the Constitution of the United States nor of the Constitution of the State of New York.

"The power to tax is in incident of sovereignty, and is coextensive with that to which it is an incident, and all subjects over which the sovereign power of the State extends are objects of taxation."

Graves v. *Schmidlapp*, 315 U. S. 657.

"States have unrestricted power to tax those domiciled within them, so long as the tax is imposed upon property within the State or on privileges enjoyed there and it is not palpably arbitrary or unreasonable."

Lawrence v. *State Tax Commission of the State of Mississippi* (1932), 286 U. S. 276.

In this case no question is raised concerning the right of the municipality to tax, nor of the assessment nor the amount of the taxes. Petitioner's claim that the respondent, as County Treasurer, though commanded by statute, was powerless to sell this property for delinquent taxes because there was a receiver of rents appointed by the State Court in a partition action and the property therefore was in the custody of the Court (State) and a sale thereof during the alleged custody was void.

The property herein was assessed in the name of "Sarah A. Kimball." In 1925 her heirs, as tenants in common,

instituted a partition action. This action is still pending and undetermined after over twenty-three years of litigations. Successive receivers of rent were appointed, the petitioner being the last receiver. Taxes on this property were paid from time to time during the litigation. There was default in payment of the taxes for the years 1938 and 1939, and pursuant to statute the respondent sold the property in 1940 and 1941 to itself for the amount of the tax liens which it was enabled to do under law. The county thereafter conveyed its interests in the property to the Federal Investors, Inc., for the amount of the unpaid tax liens.

Five years after the last tax sale, in 1946, the petitioner receiver and one of the parties to the partition action instituted this action to set aside the tax sales, and the conveyances subsequently made as "null, void and of no effect."

It is acknowledged that the County Treasurer complied faithfully and completely with all applicable provisions of law, of City Charter and tax statutes, but it is contended that the property was in the custody of the Court through its receiver and that its sale, without Court permission, was void.

On this application petitioners claim that Respondent Smith's action, in accordance with the statutes governing sale of property for delinquent taxes, denied to them and those interested equal protection of the laws and deprived them of property without due process of law.

The question whether certain property is taxable under the State Law is a State question and does not touch fundamentals contemplated by the 14th Amendment.

Rogers v. *Hennepin County* (Minn.), 240 U. S. 184.

In this case petitioner and those interested in the property had the remedy of paying their taxes within the time

prescribed by law. Under the appropriate statutes (referred to hereinbefore) they were afforded the right to redeem even after the sale by the County Treasurer. Thus, in addition to being given the entire year for payment of taxes to the municipality they were afforded almost nine months before the County Treasurer sold and one year after he sold, in which to redeem. Under the law they were afforded the same protection as every other citizen within the tax district.

The sovereign may adopt any appropriate procedure known to the law to collect taxes and it is not required to provide for hearing in a judicial tribunal before it may use the processes which follow upon the entry of a judgment in such a tribunal in order not to violate requirements of "due process of law."

People v. *Skinner* (1941), 115 P. (2nd) 488, 18 Col. (2nd) 349.

Statutes providing for tax sales, allowing counties to purchase lands at tax sales and for the sale of tax sale certificates do not deny due process of law.

Ingraham v. *Hanson*, 297 U. S. 378.

American Co. v. *City of Lakeport*, 230 Col. 548.

Messer v. *Lang*, 176 So. 548, 219 Fla. 546.

Spitcanfsky v. *Hatten*, 182 S. W. (2nd) 86, 353 Mo. 94, 160 A.L.R. 990.

The petitioners' claim that because there was a receiver appointed by the State Court in the partition action the County Treasurer must obtain permission of the Court before selling for non-payment of taxes is to assume the existence of a power in the Court to prevent the tax sale or postpone it indefinitely.

Such a practice would create tax exemption by judicial fiat in favor of receiver-held property in contravention of

the Constitutional provision that, "Exemptions from taxation may be granted only by general laws."

Under the statutes of the State of New York, once a default occurs and the statutory conditions are met the County Treasurer must obey the law and sell the property no matter by whom owned, whether incompetent, infant, trustee, or receiver.

Johnson v. *Smith*, 297 N. Y. 165.
Levy v. *Newman*, 130 N. Y. 11.
County of Nassau v. *Davy*, 266 App. Div. 738, aff'd 291 N. Y. 732.
Bonded Municipal Corp v. *Cordon Corp.*, 266 App. Div. 737, aff'd 291 N. Y. 733.

Receivers in partition actions obtain no title to property.

Rinehart v. *Hasco Building Co.*, 153 App. Div. 153, aff'd 214 N. Y. 635.

There is no relation between a receiver or trustee appointed by a Court pursuant to a statute, such as the Federal Bankruptcy Act and the receiver in partition. The Court, in appointing a receiver in a partition action simply does so to preserve the rights of the parties thereto as against each other.

Johnson v. *Smith*, 297 N. Y. 165.

Failure to obtain leave from the Court neither defeats the action brought nor invalidates the sale effected.

Chautauqua County Bank v. *Risley*, 19 N. Y. 369, 376-377.
Moore v. *Potter*, 155 N. Y. 481, 491.
Beardsley v. *Ingraham*, 183 N. Y. 411, 420.
Matter of Loos, 50 Hun 67, 70, 71.

Petitioner's claim in effect is, that using the receivership as a shield, the County may be prevented from sell-

ing this property for delinquent taxes while the parties carry on a protracted litigation (now over twenty-three years) to determine their individual interests. This question has been determined in favor of the taxing authorities by the Court of Appeals of the State of New York in *Johnson* v. *Smith* (297 N. Y. 165). Therein it is said:

> "In the present case, the taxes were not paid, and the County Treasurer, in selling the property under compulsion of the Tax Law, complied strictly with every applicable provision. The sales, as well as the tax deed and the subsequent conveyances being valid and proper, are immune from attack. The owners ot the property and the receiver were granted a privilege by statute to redeem; they chose not to avail themselves of it."

None of the cases cited by the petitioners are germane to the question herein.

Petitioners and owners show no denial of rights under the 14th Amendment. Their remedy was to pay the taxes. They were given the same privilege as every other taxpayer within the district and did not exercise their right of redemption.

A decision of a State Court that the formalities required by the Tax Laws were fully observed does not present a Federal question, where the contention is not that the statutes are unconstitutional, but that the manner of their observance was a denial of due process of law.

French v. *Taylor* (Wash., 1905), 199 U. S. 274.

In view of the fact that respondent acted under the command of the statutes of the State of New York; that there was no denial of rights of petitioners and owners within the meaning of the 14th Amendment of the United States Constitution or the Constitution of the State of

New York; that there is no Federal question herein and that the petitioner and owners neglected to pay their taxes on this property and failed to redeem the sales within the time allowed by law, their petition for a writ of certiorari should be denied.

It is therefore respectfully submitted that this case is not a proper one for review by certiorari in this Court, and that the petition for a writ of certiorari should be denied.

Dated: August 18, 1948.

WALTER L. COLLINS,
FRANK PEDLOW,
NEILE F. TOWNER,
ROBERT E. WHALEN,
Counsel for Respondent,
John M. Smith.

Index.

TABLE OF CASES CITED.

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 166.

J. HOWARD JOHNSON, as Receiver of All the Rents and Profits Issuing Out of Premises Situated on the Northeasterly Corner of Green and Beaver Streets, in the City of Albany, New York, and WALLACE J. ALLENDORF,

Petitioners,

vs.

JOHN M. SMITH, County Treasurer of the County of Albany; YETTA V. SANDLER, JOHN CARROLL, L. BERMAN, NEW YORK STATE LIQUIDATING CORP., FEDERAL INVESTORS, Inc., "JOHN DOE" and "MARY ROE," Said Last Two Names Being Fictitious, Being All Tenants, Occupants and Claimants Under Any of the Tax Sales Described in the Complaint Whose Names Are Unknown to the Plaintiffs,

Respondents.

Brief of Respondents, Yetta V. Sandler, John Carroll and L. Berman in Opposition to Petition for Writ of Certiorari.

Statement of the Case.

The Statement of the Case contained in the petition for the Writ of Certiorari is, in the main, correct, except that the statements therein contained as to the value of the premises are purely opinionative rather than factual, and in any event are entirely irrelevant to the question of law here involved. Furthermore, the petitioners fail to state that the real property in question, while in possession of the receiver, was sold for delinquent tax liens in numerous years prior to the sales in question, and was sold for tax liens for the years 1940, 1941 and 1942, while the receiver was still in possession and collecting the rents thereof.

Opinions Below.

The opinion of the Special Term of the Supreme Court, Albany County, New York, may be found at page 85 of the record. The opinion of the Appellate Division of the Supreme Court, Third Department, is reported in 272 Appellate Division 6. The opinion of the Court of Appeals is reported in 297 New York, 165.

ARGUMENT.

Summary of Argument.

Point 1. The jurisdictional statement of the petitioner does not comply with Rule 12 of the Rules of the Supreme Court in that it does not specify how and where the alleged Federal question was raised in the Courts below, and no Federal question was raised in said Courts.

Point 2. The neglect of the County Treasurer to obtain leave of the Court before a tax sale of property in the hands of a receiver is not a jurisdictional defect making the sale invalid.

Point 3. There was no denial of due process or equal protection of the law under the Federal or State constitutions.

POINT 1.

The jurisdictional statement of the petitioner does not comply with Rule 12 of the Rules of the Supreme Court in that it does not specify how and where the alleged Federal question was raised in the Courts below, and no Federal question was raised in said Courts.

Under Rule 12 of the Rules of Supreme Court, the petitioner must specify the method and manner in which the Federal question was raised in the Court of original jurisdiction and in the Appellate State Courts. The petition herein is totally lacking in this respect. As a matter of fact the Federal question of due process under the 14th amendment was never mentioned until the petitioner made application for the Writ herein. This is sufficient to deny the petition.

U. S. vs. Rimer, 220 U. S. 547.

The bare averment of a Federal question is not in all cases sufficient. It must not be wholly without foundation. There must be at least color of ground for such averment.

Hamblin vs. Western Land Co., 147 U. S. 531.
Wilson vs. North Carolina, 169 U. S. 586.
Miller vs. Sacramento Drainage District, 256 U. S. 129.

U. S. Fidelity & Guarantee Co. vs. Oklahoma, 250 U. S. 111.

The petitioners having failed to present any Federal question as to the alleged denial of their rights under the 14th amendment to the State Courts, they are estopped from raising the question now. No such question was raised by the briefs or argument of counsel nor was such question considered in the opinion of the Court of original jurisdiction or the opinions of the Appellate State Courts.

Federal questions which the highest State Court is, by its settled practice, justified in disregarding, either because not assigned or because not noticed or relied upon in the brief or argument of counsel, will not serve as the basis of a writ of error from the Federal Supreme Court.

Hulbert vs. Chicago, 202 U. S. 275.
Cox vs. Texas, 202 U. S. 446.
Tidal Oil Co. vs. Flanagan, 263 U. S. 444.

Petitioners are therefore precluded from asserting the alleged denial of a Federal right for the first time on this application.

Appleby vs. Buffalo, 221 U. S. 524.
Wilson vs. Cook, 327 U. S. 474.

POINT 2.

The neglect of the County Treasurer to obtain leave of the Court before a tax sale of property in the hands of a receiver is not a jurisdictional defect making the sale invalid.

Sales for taxes may not be set aside for any defect or irregularity in the proceeding, but only for such defects or irregularities as are jurisdictional and invalidate the entire proceeding.

Failure to obtain leave of the Court to sue a receiver has never been considered in the State of New York a jurisdictional defect nor does it invalidate the proceeding, *ab initio.*

> "In this state failure to obtain permission to sue a domestic receiver is an irregularity merely which is punishable as for a contempt, and can be cured or waived at any stage of the action. (*Taylor vs. Baldwin,* 14 Abb. Pr. 166; *DeGroot vs. Jay,* 30 Barb. 483; *Hubbell & Curran vs. Dana,* 9 How. Pr. 424; *James vs. James Cement Co.,* 8 N. Y. St. Repr. 490.)"

LeFevre vs. Matthews, 39 A. D. 232.
Pruyn vs. McCreary, 105 A. D. 302, 304.
Moore vs. Potter, 155 N. Y. 481, 490.

Justice Desmond concurring in the result in the Court of Appeals in this case, said:

> "I concur in the result on the ground that failure to get leave to foreclose is not jurisdictional. (*Chautauqua County Bank vs. Risley,* 19 N. Y. 369, 376, 377) and so this suit does not lie."

Johnson vs. Smith, 297 N. Y. 165, 174.

POINT 3.

There was no denial of due process or equal protection of the law under the Federal or State Constitutions.

No question is raised by petitioners as to the validity of the assessment and as to the procedure followed by the County Treasurer in conducting the tax sales.

> "It is acknowledged that the County Treasurer complied faithfully with all applicable provisions of law of city charter and tax statutes."
>
> *Johnson vs. Smith,* 297 N. Y. 165, 170.

Nor do the petitioners question the validity of any law or statute under which the County Treasurer acted. Their sole contention here is that the County Treasurer in conducting a tax sale of property in the hands of a receiver, without asking leave of the Court, violated a rule of the common law. The common law, however, is what the Court state it to be. Petitioners admit in their brief (p. 15) "that no one has a vested right in a rule of the common law."

The ruling of the State Courts on a question of construction and application of a rule of common law cannot be considered a denial of due process or equal protection of the law.

The question is not a novel one. The State Courts have consistently held that a County Treasurer delegated with the sovereign taxing power, must obey the law's mandate and sell the property no matter by who owned —whether by incompetent, infant, trustee or receiver.

> *Levy vs. Newman,* 130 N. Y. 11.
> *County of Nassau vs. Day,* 266 A. D. 738, affirmed 291 N. Y. 732.

Bonded Municipal Corp. vs. Carodix Corp., 266 A. D. 737, affd. 291 N. Y. 733.

The decision of a State Court involving nothing more than the ownership of property, with all parties in interest before it, cannot be regarded by the unsuccessful party as a deprivation of property without due process of law, simply because its effect is to deny his claim to own such property.

Tracy vs. Ginzberg, 205 U. S. 170.
Enterprise Irrigation District vs. Farmer's Mut. Canal Co., 243 U. S. 157.
Fox River Paper Co. vs. Railroad Commission, 274 U. S. 651.

Even if it were considered *arguendo*, that the Court of Appeals erred herein in its decision, while acting within its jurisdiction, it must be accepted as a correct exposition of the law of the State, common, statutory, and constitutional, and the only inquiry can be, does the State law, as applied, afford due process?

In re Converse, 137 U. S. 624.
Worcester County Trust Co. vs. Riley, 302 U. S. 292.

The cases cited by petitioners are not germane to the issue. Nothing said or decided by this Honorable Court in *re Tyler*, 149 U. S. 164, can be considered as authority for the proposition that the tax sales herein were a denial of due process or equal protection of the law. In the *Tyler* case there was involved a federal statutory receiver who had been placed by the Federal Court in charge of a railroad property, and had taken not only possession but title thereto. A sheriff had seized the property for delinquent taxes in violation of two successive orders enjoining him from interfering with the receiver's possession.

In the instant case, however, the receiver never took title nor does the order appointing him enjoin the County Treasurer or anyone else from proceeding against the receiver. As said by Justice Fuld in his opinion herein;

> "It may well be that court approval is required if in possession is a statutory receiver or trustee or a receiver or trustee appointed by a court pursuant to a statute—such as the Federal Bankruptcy Act—granting extremely broad powers. Quite apart from any other consideration, under the Bankruptcy Act, title to the property vests in the trustee (Bankruptcy Act, 70; U. S. Code, tit. 11, 110). A receiver in partition, on the other hand, obtains no title to the property (*Rinehart vs. Hasco Building Co.*, 153 App. Div. 153, affd. 214 N. Y. 635); title remains vested in the owners who are the parties to the partition action. As is evident from the order of appointment, the receiver is given merely the right to manage the premises on behalf of those owners until the action has been concluded."

Johnson vs. Smith, 297 N. Y. 165, 171, 172.

It is respectfully submitted that petitioner's application for a Writ of Certiorari herein should be denied.

Respectfully submitted,

MAURICE FREEDMAN,
JACK GOODMAN,
Of Counsel.